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Ugonna Philip Nwankwo v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–198–08 OF 2013 (NGA)
MOHTARUDIN BAKI, TENGKU MAIMUN TUAN MAT AND ZAKARIA SAM JJCA
15 JANUARY 2016

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Criminal Law — Dangerous Drugs — Trafficking in dangerous drugs — Appeal — Appeal against conviction and sentence — Whether trial judge erred in handling presumptions under ss 37(d) and 37(da) of the Dangerous Drugs Act 1952 — Whether trial judge erred when made no ruling whether presumption under s 37(da) rebutted — Whether trial judge failed to adequately appreciate defence case — Whether conviction safe — Dangerous Drugs Act 1952 ss 37(d) & 37(da)

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This was an appeal against the conviction and sentence of the appellant by the High Court judge on two charges of trafficking in dangerous drugs. The first charge was based on the drugs found in the Subang Jaya house ('the said house') whereas the second charge was based on the drugs found on the appellant during a search conducted by one Insp Ihwan Hilmi bin Ismail ('SP5') at the Sunway Pyramid, Subang Jaya. The chemist ('SP6') confirmed that the drugs found on the appellant and at the said house were cannabis as defined under s 2 of the Dangerous Drugs Act 1952 ('the DDA'). At the end of the prosecution case, the court found that a prima facie case had been made out and called the appellant to enter his defence. In his defence, the appellant had given evidence about Moses and Sani Wahab who were found in the said house during the raid by the police. However, Moses and Sani Wahab were not called by the prosecution and not offered to the defence. At the end of the trial, the trial judge found that the prosecution had proved its case beyond reasonable doubt. The appellant was convicted and sentenced to death, hence, this appeal. The grounds of appeal were that: (a) the learned trial judge erred in her approach in the handling of the presumptions and the finding of prima facie in respect of the two charges; (b) the learned trial judge erred when Her Ladyship made no ruling whether presumption under s 37(da) of the DDA had been rebutted; and (c) the learned trial judge failed to adequately appreciate the defence of the appellant.

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Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) Based on the grounds of judgment, the court was in doubt whether the prima facie case on the second charge was premised on presumed possession under s 37(d) of the DDA and trafficking under s 2 of the DDA or whether it was on actual possession and presumed trafficking under s 37(da) of the DDA. Further, apart from the failure of the learned trial judge to make an affirmative finding on possession in respect of the first charge, Her Ladyship had also failed to make finding whether the appellant had rebutted the presumption of trafficking under s 37(da) of the DDA. Based on decided cases, this omission was a material misdirection, warranting appellate intervention (see paras 25 & 30).

(2) The learned trial judge did not make any finding regarding the non-calling of Moses and Sani Wahab although the issue was canvassed by the defence. Once the evidence was placed before the court and submissions made, the learned trial judge was under a statutory duty to make a finding. The omission of the learned trial judge to do so had occasioned a failure of justice to the appellant. In light of the infirmities in the grounds of judgment, the conviction was not safe (see paras 36–37).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap sabitan dan hukuman perayu oleh hakim Mahkamah Tinggi atas dua tuduhan mengedar dadah berbahaya. Tuduhan pertama adalah berdasarkan dadah yang dijumpai di dalam rumah di Subang Jaya ('rumah tersebut') sementara tuduhan kedua adalah berdasarkan dadah yang dijumpai pada perayu semasa carian yang dilakukan oleh seorang Insp Ihwan Hilmi bin Ismail ('SP5') di Sunway Pyramid, Subang Jaya. Ahli kimia ('SP6') mengesahkan bahawa dadah dijumpai pada perayu dan di rumah tersebut adalah kanabis seperti yang didefinisikan di bawah s 2 Akta Dadah Berbahaya 1952 ('ADB'). Pada akhir kes pendakwaan, mahkamah mendapati bahawa kes prima facie telah dibuat dan memanggil perayu untuk memasukkan pembelaannya. Dalam pembelaannya, perayu telah memberi keterangan mengenai Moses dan Sani Wahab yang didapati berada di dalam rumah tersebut semasa serbuan oleh polis. Walau bagaimanapun, Moses dan Sani Wahab tidak dipanggil oleh pihak pendakwaan dan tidak ditawarkan kepada pembelaan. Pada akhir perbicaraan, hakim perbicaraan mendapati bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Perayu disabitkan dan dijatuhkan hukuman mati, maka rayuan ini. Alasan rayuan adalah bahawa: (a) hakim perbicaraan yang bijaksana tersilap dalam pendekatannya dalam menguruskan anggapan dan dapatan prima facie berkaitan kedua-dua tuduhan tersebut; (b) hakim perbicaraan yang bijaksana tersilap apabila Yang Arif tidak membuat perintah sama ada anggapan di bawah s 37(da) ADB telah dipatahkan; dan (c) hakim perbicaraan yang bijaksana gagal untuk menilai secara mencukupi pembelaan perayu.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan membebaskan dan melepaskan perayu:

(1) Berdasarkan alasan-alasan penghakiman, mahkamah meragui sama ada kes prima facie atas tuduhan kedua adalah didasarkan atas anggapan milikan di bawah s 37(d) ADB dan pengedaran di bawah s 2 ADB atau sama ada ia adalah milikan sebenar dan anggapan pengedaran di bawah s 37(da) ADB. Selanjutnya, selain daripada kegagalan hakim perbicaraan yang bijaksana untuk membuat dapatan afirmatif atas milikan berkaitan tuduhan pertama, Yang Arif juga telah gagal untuk membuat dapatan sama ada perayu telah mematahkan anggapan pengedaran di bawah s 37(da) ADB. Berdasarkan atas kes-kes yang diputuskan, kesilapan ini adalah salah arah material, mewajarkan campur tangan mahkamah rayuan (lihat perenggan 25 & 30).

(2) Hakim perbicaraan yang bijaksana tidak membuat apa-apa dapatan berkaitan tidak memanggil Moses dan Sani Wahab walaupun isu dirayukan oleh pembelaan. Apabila keterangan dikemukakan di hadapan mahkamah dan penghujahan dibuat, hakim perbicaraan yang bijaksana di bawah tanggungjawab statutori untuk membuat dapatan. Kesilapan hakim perbicaraan yang bijaksana untuk berbuat demikian telah mengakibatkan ketidakadilan kepada perayu. Berdasarkan alasan penghakiman yang lemah, sabitan adalah tidak selamat (lihat perenggan 36–37).]

Notes

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 976–980.

Cases referred to

Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Bahram Nikkhouyabgram Nayed v PP [2013] 6 CLJ 702, CA (refd)
Lim Pah Soon v PP [2013] 6 MLJ 252; [2013] 8 CLJ 800, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408; [2014] 4 CLJ 406, CA (refd)
Soorya Kumar a/l Narayanan @ Narayanasamy v PP [2011] 5 MLJ 774; [2009] 6 CLJ 257, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da)

Appeal from: Criminal Trial No 45A-280–09 of 2011 and 45A-281–09 of 2011 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Nurshafini bt Mustafha (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun Tuan Mat JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death by the High Court at Shah Alam on two charges of trafficking in dangerous drugs.

THE PROSECUTION CASE

[2] On 9 January 2010 at about 1pm, whilst Insp Ihwan Hilmi bin Ismail ('SP5') and his team were on surveillance duty at Sunway Pyramid, Subang Jaya, SP5 saw the appellant carrying two bags in his right hand. SP5 stopped the appellant and searched the two bags.

[3] The first bag had the word 'Topman' written on it. Inside the 'Topman' bag, there was another plastic bag which contained three blocks of dried plant material suspected to be cannabis, wrapped in transparent plastics.

[4] The second bag was a bag printed with the words 'Walk In'. Inside the 'Walk In' bag, was a plastic bag which contained two blocks of dried plant material suspected to be cannabis, also wrapped in transparent plastics.

[5] From the jeans worn by the appellant, SP5 seized seven plastic packets of dried plant material suspected to be cannabis and a bunch of four keys.

[6] SP5 and his team together with the appellant proceeded to house No 4, Jalan SS12/2D, Bandar Baru Subang, Subang Jaya ('the said house'). In the said house, SP5 found two other Nigerian, Moses and Sani Wahab in the hall. Using one of the keys seized from the appellant, SP5 opened the door to the second room. Inside the room, in the presence of the appellant, SP5 found a brown plastic bag with the word 'Padini' printed on it. Inside the 'Padini' bag, there were:

(a) a green 'Jusco' bag in which there were 62 packets of dried plant material suspected to be cannabis;

(b) a shoe box in which there were 12 plastic packets of dried plant material suspected to cannabis;

(c) a plastic packet containing dried plant material suspected to cannabis; and

(d) a compressed block of suspected cannabis.

[7] SP5 also found the appellant's Nigerian passport in the second room.

[8] The investigating officer, Insp Rozlia bt Rozali ('SP7') who later went to the said house found two copies of 'To Send Money' and a receipt from 'Sun Inn' in the name of the appellant in the second room.

[9] The drugs found in the said house formed the subject matter of the first charge while the drugs found on the appellant formed the subject matter of the second charge against the appellant.

[10] There was no issue insofar as the subject matter of the charges was concerned. The chemist Zulkefli bin Mohd Edin ('SP6') who had analysed the drugs, confirmed that they were cannabis as defined under s 2 of the Dangerous Drugs Act 1952 ('the Act'). SP6 had also confirmed the weight of the drugs, namely 1402g and 4847.2g, as stated in the first and second charges respectively.

FINDINGS OF THE HIGH COURT

[11] At the end of the prosecution case, the learned trial judge found that a prima facie case had been made out.

[12] In respect of the first charge, the learned trial judge found that the appellant occupied the second room. Having considered that the appellant had exclusive occupation and control of the room in question, the learned trial judge found that there was a strong and irresistible inference that the appellant had the requisite knowledge of the drugs.

[13] As for the ingredient of trafficking, the learned trial judge invoked the presumption under s 37(da) of the Act as follows ('appeal record Vol 1 p 25'):

> Since from the evidence, it is an irresistible inference that the accused had knowledge of the drugs in the room, s 37(da) of the Act can be invoked, that the accused is deemed to be trafficking in drugs.

[14] In respect of the second charge, the learned trial judge stated that ('appeal record Vol 1 p 25'):

> Since the prosecution had proven that the accused had the custody and control of the two plastic bags that he was caught carrying and the seven packets in his pocket, the prosecution is entitled to rely on the above stated presumption.

However, from the surrounding facts, it can be also irresistibly inferred that the accused knew what he was carrying in the two plastic bags and in his pocket.

[15] On the element of trafficking, the learned trial judge said:

For this ingredient as well, the prosecution can either prove by direct evidence of trafficking as defined in s 2 of the Act or invoke the presumption under s 37(da) of the Act.

[16] The learned trial judge proceeded to state the following in respect of the second charge ('appeal record Vol 1 p 26'):

Since from the facts of this case, knowledge can be inferred from the surrounding circumstances or it can be invoked under s 37(d) of the Act, this element of trafficking as defined under s 2 of the Act can be proven by direct evidence, or presumed under s 37(da) of the Act bearing in mind the law against double presumption.

If s 37(da) of the Act is invoked for the element of knowledge, then the prosecution would have to prove trafficking as defined in s 2 of the Act.

[17] And at p 27 of the appeal record:

The accused was seen coming out/walking out of the Sunway Pyramid. This would show that he was from one place and going to another place. Thus the element of *transporting/carrying* the drugs from one place to another.

Then, the amount of drugs (4847.2g) would be a strong inference that is for trafficking – *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, a Privy Council decision which was later applied by the Court of Appeal in the case of *Mohamed Yazri Minhat v Public Prosecutor* [2003] 2 CLJ 65.

However, on the other hand if the element of knowledge is proven from the fact of the case, the prosecution can rely on the presumption under s 37(da) of the Act in establishing the element of trafficking.

Thus, in respect of the drugs found on the Accused trafficking is proven by either way ie direct evidence or by invoking the presumption. (Emphasis added.)

[18] The learned trial judge concluded that all the ingredients of the both the charges had been proven. The appellant was called upon to enter his defence.

THE DEFENCE

[19] The appellant gave evidence under oath. His defence as summarised by the learned trial judge was:

(a) he hails from Nigeria and came to Malaysia in 2007 to study;

(b) he was a fourth year Computer Science student at the WIT College in Klang. In Malaysia, he stayed at Mentari Court Apartment, Subang Jaya with his two friends;

(c) on 9 November 2010, around 9.30am, he went to an African restaurant in Sunway Pyramid, Subang Jaya;

(d) at about 1pm, after he had finished eating, he left Sunway Pyramid and headed towards a nearby bus stop;

(e) at the bus stop, he met a friend by the name of Chinedu. Chinedu was staying at No 4, SS12/2D, Subang Jaya with Moses, who was also a friend of the appellant;

(f) at that moment, Chinedu was seen holding two bags ('P12A and P13A'). While talking, Chinedu suddenly threw the bags on the ground and ran away;

(g) the appellant looked behind him and saw a group of men rushing towards him. He was arrested whilst one of the man tried to chase Chinedu but was to no avail;

(h) later the appellant found out that those people were police officers. The police asked where Chinedu lived. The appellant took them to Chinedu's house in Subang Jaya;

(i) at Chinedu's house, there were three other persons, ie Moses, Wahab and one Malay guy. All of them were also arrested by the police but the Malay guy was released right after;

(j) the police then conducted a search around the house. There were three bedrooms in the house. The police attempted to enter the second room in the house but it was locked;

(k) Moses showed them the key to the second room that was on a table when asked by the police;

(l) using the key shown by Moses, the police opened the door and found a brown plastic bag on the closet. The plastic bag contained dried plant material suspected to be cannabis; and

(m) the appellant, Moses and Wahab were later taken to the police station.

[20] At the conclusion of the trial, the learned trial judge found the defence to be lacking in probability, possibility and logic and without any evidential support. The prosecution was found to have proved its case beyond reasonable doubt. The appellant was convicted and sentenced to death, hence the appeal.

A THE APPEAL

[21] Before us, learned counsel canvassed the following grounds:

(a) the learned trial judge erred in her approach in the handling of the presumptions and the finding of prima facie in respect of the two charges;

(b) the learned trial judge erred when Her Ladyship made no ruling whether s 37(da) presumption had been rebutted; and

(c) the learned trial judge failed to adequately appreciate the defence of the appellant.

[22] In respect of the first ground, relying on the case of *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408; [2014] 4 CLJ 406 and *Soorya Kumar a/l Narayanan @ Narayanasamy v Public Prosecutor* [2011] 5 MLJ 774; [2009] 6 CLJ 257, learned counsel submitted that the learned trial judge committed an error in her ruling that there was a prima facie case. The error was in the learned trial judge's failure to make a definite finding as regards the second charge whether it was a case of deemed possession under s 37(d) read with the acts of trafficking under s 2 of the Act or whether it was a case of actual possession read with the trafficking presumption under s 37(da) of the Act.

[23] The second ground concerned the invocation of presumption of trafficking under s 37(da) for the first charge. Learned counsel highlighted that Her Ladyship did not make an affirmative finding of possession and did not find whether the presumption had been rebutted, which was incumbent for her to do so. Learned counsel argued that the omission of the learned trial judge amounted to an appealable error.

[24] The third ground of appeal was in respect of Moses and Sani Wahab who were not called by the prosecution and not offered to the defence.

OUR FINDINGS

[25] We will consider the first and the second grounds of appeal together. It cannot be denied that reading the grounds of judgment as a whole, we were left in a state of doubt whether the prima facie case on the second charge was premised on presumed possession under s 37(d) and trafficking under s 2 of the Act or whether it was on actual possession and presumed trafficking under s 37(da) of the Act.

[26] This court had the occasion to consider similar issues in *Seyedalireza*. The learned trial judge in *Seyedalireza* had committed the same error where Her Ladyship had invoked both presumptions under s 37(d) and (da) of the Act in the alternative and had failed to make a finding at the end of the defence case as to whether the appellant had rebutted the presumption.

[27] In *Seyedalireza*, this court had unanimously ruled that the approach of the trial judge in merely relying on the alternative without electing or making a finding whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before the trial judge, amounted to a misdirection by way of a non-direction. The order of conviction and sentence of the High Court was set aside and the appellant was acquitted and discharged. The order of this court in *Seyedalireza* was affirmed by the Federal Court vide Mahkamah Persekutuan Rayuan Jenayah 05–53–03 Tahun 2014 (B).

[28] As for the first charge, we noted that the learned trial judge had invoked the presumption of trafficking under s 37(da) of the Act ('appeal record Vol 1 p 25'). However, nowhere in the grounds of judgment of the learned trial judge did Her Ladyship make a finding on possession.

[29] In *Soorya Kumar* Ahmad Maarop JCA (now FCJ) said at p 268:

> [17] We now come to a more serious misdirection. This occurred when the learned judge found that the defence had failed to rebut the presumption of trafficking under s 37(da)(vi) of the Act. On the basis of the law as stated in *Muhammed b Hassan v Public Prosecutor* , this finding presupposes that the learned trial judge was satisfied that the said presumption had arisen in the first place. The question is when was he so satisfied? We have said earlier that before the presumption under s 37(da) of the Act can arise, there must be an affirmative finding of possession. As we have demonstrated, the learned judge did not make an affirmative finding of possession at the close of the prosecution's case. So, his finding regarding the defence's failure to rebut the presumption under s 37(da) of the Act is really bewildering ...

[30] Apart from the failure of the learned trial judge to make an affirmative finding on possession in respect of the first charge, Her Ladyship had also failed to make a finding whether the appellant had rebutted the presumption of trafficking under s 37(da). Based on decided cases this omission was a material misdirection, warranting appellate intervention (see for eg *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 172; *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209, at p 219; [1996] 1 CLJ 705, at p 720; *Bahram Nikkhouyabgram Nayed v Public Prosecutor* [2013] 6 CLJ 702 at p 723; and *Seyedalireza Seyedhedayatollah* at p 417).

[31] Given the above, we found merits in the first two grounds canvassed by learned counsel, on which grounds the appeal ought to succeed.

[32] Moving on nevertheless to the third issue, learned counsel argued that the learned trial judge failed to appreciate the defence, in particular, the aspect of the defence which was related to Moses and Sani Wahab who were arrested in the hall of the said house. Both of them were released after 14 days of remand. Since it was the defence that the second room was not occupied by the appellant but by Chinedu, learned counsel contended that the defence was prejudiced by the failure of the learned judge to consider Moses because Moses, who was the tenant of the said house, could confirm whether Chinedu occupied the second room.

[33] We found that Moses and Sani Wahab were not fictitious characters. SP5 in his evidence had stated (appeal record Vol 1 p 75):

> Sampai di sana saya dapati pintu grill dan sliding door tidak tertutup. Kemudian saya dan pasukan serbuan telah masuk ke rumah tersebut dapati ada 2 penghuni di rumah tersebut yang ada di ruang tamu yang mana penghuni pertama dikenali sebagai Moses dan penghuni kedua dikenali sebagai Sani Wahab. Kedua-dua penghuni warganegara Nigeria.

[34] SP7 had similarly testified regarding Moses and Sani Wahab (appeal record Vol 2 p 131):

> Moses dan Sani Wahab telah dibebaskan atas arahan DPP. ... Dibebaskan dengan bon 118 untuk Moses. ... Saya tidak boleh dapatkan Moses ini. ... Berdasarkan siasatan penyewa rumah ini adalah OKT dan Moses.

[35] It was further in evidence that from Moses, the police also recovered a bunch of four keys (see the search list at appeal record Vol 4 p 368).

[36] The learned trial judge did not make any finding regarding the noncalling of Moses and Sani Wahab although the issue was canvassed by the defence in the court below (appeal record Vol 3 p 256–258). Once evidence was placed before the court and submissions made, the learned trial judge was under a statutory duty to make a finding. The omission of the learned trial judge to do so had occasioned a failure of justice to the appellant (see *Lim Pah Soon v Public Prosecutor* [2013] 6 MLJ 252; [2013] 8 CLJ 800).

[37] We were unanimous in our view that in the light of the infirmities in the grounds of judgment, the conviction was not safe. The appeal was therefore allowed. The conviction and sentence of the High Court was set aside. The appellant was acquitted and discharged.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Dzulqarnain Ab Fatar